PP

v.

OGUJIOFOR FRANK CHIKE

HIGH COURT MALAYA, SHAH ALAM
AHMADI ASNAWI J
[CRIMINAL TRIAL NO: 45A-253-2010]
31 DECEMBER 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1,463g of methamphetamine - Whether prima facie case established - Possession and knowledge - Whether accused had custody and control of luggage containing drugs - Whether accused in mere passive physical possession of drugs - Whether provision under s. 37(d) of Dangerous Drugs Act 1952 applicable - Whether accused's conduct could lead to inference that he was trafficking in drugs - Whether defence posited by accused created reasonable doubt upon prosecution's case - Whether accused failed to rebut statutory presumption invoked against him - Criminal Procedure Code, s. 51A(1)(c)*

The accused, a Nigerian, was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), for trafficking in 1,463 grammes of methamphetamine at the Kuala Lumpur International Airport ("KLIA"), an offence punishable under s. 39(B)(2) of the same Act, carrying the mandatory death penalty. The facts showed that the accused, who was walking towards Green Lane A at the KLIA Arrival Hall, was stopped by a customs officer and was instructed to put the brown luggage he was lugging ("exh. P19") and a hand-carry bag he was carrying ("exh. P20") through the scanner machine. PW4, the senior customs officer on supervisory duty, noticed a suspicious image in exh. P19. The accused was then taken to the office of the Cawangan Pemeriksaan Penumpang ("CPP") where upon further examination of the said luggage, aluminium foil packets containing white crystal substance were found which tested positive for methamphetamine. The accused, in his defence, submitted that he was under the impression that he was smuggling diamonds and precious stones upon the behest of one Ifeanyi, who had told him that the syndicate the accused had earlier borrowed money from

would waive his loan and interest if he agreed to smuggle diamonds and precious stones to Malaysia. The accused submitted that he had no knowledge of the drugs and maintained that he was merely an innocent carrier.

Held (convicting and sentencing accused to death):

(1) There was no doubt that, at all material times, the said luggage exh. P19 where the said drugs were cunningly concealed and subsequently found by PW4 were in the custody and control of the accused. Thus, the provision under s. 37(d) of the Act was applicable and was properly invoked against the accused (*Ibrahim Mohamad & Anor v. PP*, refd). In such event, he is deemed not only to be in possession of the said drugs but is also deemed to have knowledge of the nature of the said drugs until the contrary is proved. (paras 16, 25 & 28)

(2) The act of carrying the said drugs from Nigeria into KLIA (Malaysia) is trafficking within the definition of s. 2 of the Act. The quantity of the said drugs carried by the accused was huge. It could safely be inferred that it could not have been for his own consumption. The offending drugs were also neatly wrapped in aluminium foil packets and neatly placed beneath two layered linings in the luggage. The clandestine nature of the accused's conduct in carrying the said drugs in the manner aforesaid could only lead to the inference that he was trafficking in the said drugs. Thus, he was not in mere passive physical possession of the said drugs. (paras 31, 34 & 38-39)

(3) The fact that the accused was cooperative upon his arrest and thereafter was no ground to suggest that the accused had no knowledge of the said drugs in his luggage. Equally, the fact that he appeared shocked *per se* upon the discovery of the said drugs was no ground to suggest that his conduct was consistent with his innocence. By the same token in the absence of other compelling evidence, it was no ground to suggest that he had successfully rebutted the presumption of knowledge of the nature of the said drugs. Further, a mere statement coming from the accused without it being tested in cross-examination and without taking into account the testimonies of his opponent was no ground to suggest that the

same were factual evidence favourable to the defence and therefore ought to be delivered to the defence pursuant to s. 51A(1)(c) of the Criminal Procedure Code. (paras 42 & 43)

(4) It was put to the investigating officer of the case, PW5, that the character "George" had travelled in the same flight as the accused to keep an eye upon the accused. Hence, the defence submitted that an investigation should have been carried out with regard to George and as it was not done, it should be resolved in favour of the defence. However, if George was there to keep an eye on the accused, logic would dictate that he would have been in close proximity with the accused at all times or at least seen walking together with the accused along Green Lane A before the accused was stopped. But PW4 had only seen the accused walking alone. Neither did the accused inform PW4 of George's presence with him or within the vicinity. In such event, no investigation could be carried out pertaining to the character of George as the said character was brought only to PW5's attention during cross-examination in court. (paras 51, 52, 55 & 56)

(5) Apart from the accused's bare oral testimony, there was no evidence to show that the accused had borrowed USD 30,000 from a syndicate or that he was compelled to do Ifeanyi's bidding or that his family was threatened by Ifeanyi if he refused to comply with Ifeanyi's demands to smuggle the diamonds and precious stones out of Nigeria into Malaysia. The law is trite by virtue of s. 103 of the Evidence Act 1950 that he who assert must prove his assertion. Additionally, the accused's testimony regarding as to how he came into possession of the said luggage P19 and the role played by Ifeanyi and George in the whole scheme of events was raised for the first time to the prosecution witnesses only in court. The accused's evidence pertaining to these two characters and the roles played by them were mere recent inventions pandering in afterthought. (paras 69, 78 & 80)

(6) The defence posited by the accused had not created a reasonable doubt upon the prosecution's case and had failed on the balance of probabilities to rebut the statutory presumption invoked against him under s. 37(d) of the Act. The factum of the custody and control of the luggage P19

A remained intact. On the evidence adduced, the accused had equally failed to rebut the deemed possession of the said drugs and the deemed knowledge of the nature of the said drugs. The defence of the accused was a simple denial of having possession of the said drugs and having knowledge of the
B nature of the said drugs. Such denial was insufficient without other proofs to reasonably dislodge the prosecution's case and was equally incapable of rebutting the presumption applicable against him. The prosecution had successfully proved the offence against the accused beyond a reasonable doubt and he
C was accordingly found guilty and convicted of the offence. (paras 82-84)

Case(s) referred to:
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
D *Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC* ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamed Yatin Abu Bakar v. PP [1949] 1 LNS 50 HC ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
E *Parlan Dadeh v. PP [2009] 1 CLJ 717 FC* ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 3 CLJ 113 SC ***(refd)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
F *PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
Samundee Devan Muthu Kerishnan v. PP [2010] 3 CLJ 269 FC ***(refd)***
Toh Su Kuan v. PP [2005] 3 CLJ 740 CA ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
G Criminal Procedure Code, s. 51A(1)(c)
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(1)(a), (2)
Evidence Act 1950, s. 103

For the respondent - Zuraini; DPP
For the appellant - Halim Asgar; M/s KA Ramu Vasanthi & Co

H

Reported by Suhainah Wahiduddin

I

JUDGMENT

Ahmadi Asnawi J:

[1] The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 ("the DDA"), for trafficking in 1,463g of methamphetamine on 26 August 2010 at about 3pm at Kaunter Pemeriksaan Kastam A, Cawangan Pemeriksaan Penumpang, Balai Ketibaan Antarabangsa, Kuala Lumpur International Airport (KLIA), Sepang, Selangor, an offence punishable under s. 39(B)(2) of the same Act, carrying the mandatory death penalty.

Case For The Prosecution

[2] Senior customs officer Elangovan a/l Rethnasamy, PW4, was on supervisory duty at the Cawangan Pemeriksaan Penumpang ("CPP") Unit on the aforesaid date (26 August 2010). He had 25 officers under his supervision and had instructed his men to observe passengers arriving on flight from Abu Dhabi and Dubai.

[3] At about 3.10pm he saw the accused walking through the Green Lane A. He stopped the accused with the assistance of customs officer Zamri and instructed the accused to put his brown luggage he was lugging ("exh. P19") and a hand-carry bag ("exh. P20") he was carrying through the scanner machine, then manned by customs officer Fahmi.

[4] PW4 testified that he noticed a suspicious image in exh. P19 on the scanning machine. The image appeared on the left and right part of the said luggage.

[5] The accused was then asked to put luggage P19 on the examination counter. PW4 next asked for the accused's passport (exh. P21) and compared the name in the passport with the name appearing on the luggage tag (exh. P19(1)) tied to the handle of the said luggage. He found the name on P19(1) to bear the accused's name as in his passport, P21.

[6] Next PW4 instructed the accused to open the luggage P19. The luggage was fitted with a lock (exh. P22). The accused then took a key (exh. P22A) from a bunch of three keys and unlocked the lock. Thereafter PW4 asked the accused to removed the clothings therein. He groped (PW4 used the words "raba" in Bahasa Melayu) the left and right part of the luggage. He felt there were things hidden there.

[7] The accused was then asked to repack his clothings into the said luggage and was taken to CPP's office located on the same floor together with the luggage P19 and the hand-carry bag, P20. There PW4 called and waited for the arrival of the investigating officer (IO) of the case before taking further action.

[8] The IO of the case, PW5, arrived at the CPP's office at about 4.30pm together with the photographer (PW2) and two other officers. In their presence PW4 instructed the accused to take out the clothings from the luggage P19. PW4 then proceeded to rip the left black lining layer inside P19. This layer is exh. P19(2). Inside P19(2) was another layer made of fabric, exh. P19(3). Upon ripping P19(3), PW4 found an aluminium foil packet, exh. P17(A). He made a small tear and found P17(A) to contain white crystal substance. He tested the substance using a test kit and found that it tested positive for methamphetamine.

[9] PW4 then made a similar search on the right part of the luggage P19. There were two similar layers lining this part of the luggage, marked exhs. P19(4) and P19(5). PW4 then ripped P19(5) and inside he found an aluminium foil packet, exh. P17(B). However PW4 did not carry out any test on the contents of P17(B).

[10] Thereafter the accused was placed under arrest and a police report was lodged by PW4 *vide* KLIA Report No. 9079/10. The accused and all the exhibits were then handed over to the IO of the case as evinced in exh. P47, Senarai Barang Bukti and P48, Borang Penyerahan Barang-Barang Kes. Subsequently the accused was taken to Pejabat Kastam, Kampong Jinjang, Negeri Sembilan.

The Nature Of The Drugs

[11] The chemist, PW3, confirmed receiving the two aluminium foil packets exhs. P17(A) and P17(B) from the IO of the case, PW5, on 30 August 2010. She confirmed the two aluminium foil packets contained white crystal like substance.

[12] She testified that she had examined the said substance and narrated the three tests she had applied to determine the same, namely the colour test, Gas Chromatography Mass Spectrometry Qualitative test and Gas Chromatography Flame Ionization Quantitative test. At the end of her examination/analysis, she found that the substance in exh. P17A were methamphetamine

weighing 690g and the substance in exh. P17(B) were also methamphetamine weighing 773g (hereinafter referred to as "the said drugs") and that methamphetamine is listed in the First Schedule of the DDA.

[13] The said drugs were produced in court through PW3 and respectively marked as exhs. P18(A) and P18(B).

[14] The identity of the drugs analysed and examined by PW3 was not challenged by the defence. Equally not challenged was the conduct of the analysis and the tests carried out to determine the same. The mode for the safe keeping and storing of the said drugs whilst in PW3's custody was also not challenged. Neither was there an issue with the weighing machine the chemist had used to calculate the weight of the said drugs. The chain of evidence relating to the movement of the said drugs from the moment the chemist received it until its production in court was also not disputed.

[15] I have no reason to reject PW3's findings. It is clear from her testimony that she is a qualified and experienced chemist. There were no infirmities in the tests conducted by her. In fact there was no challenge at all mounted by the defence in respect of PW3's testimony and findings. Hence I am satisfied that from the tests conducted by her and from the evidence she had adduced in court, the said drugs were methamphetamine, listed in Part III of the First Schedule of the DDA 1952.

Custody And Control

[16] In all the circumstances of the case, there can be doubt that at all material times the said luggage exh. P19 where the said drugs were cunningly concealed and subsequently found by PW4 were in the custody and control of the accused.

[17] He was seen carrying/lugging the said luggage by PW4 and his subordinate. There was a luggage tag bearing his name and flight number he was in, tied to the handle of the said luggage. The luggage was fitted with a lock and the key to the lock was with him. He used the said key in his possession to unlock the lock to open the luggage.

[18] When the luggage was finally opened and thoroughly examined there were men's apparels. These apparels apparently were his as these apparels perfectly fitted his person as shown in the photographs, exh. P9 (1 to 6).

[19] Finally the two aluminium foil packets were found concealed beneath two layers of linings fitted within the said luggage.

[20] The factum enumerated above were never denied by the accused.

[21] Additionally the testimonies of both PW4 and the IO (PW5) relating to the seizure of the said luggage containing the said drugs and the arrest of the accused were consistent and cogent enough and did not suffer from apparent infirmities to warrant rejection or to be treated with suspicion nor were neither inherently improbable. Hence I have no reason to reject their testimonies.

[22] From the narratives stated above, there can be only one conclusion, that is the said luggage containing the said drugs were under the custody and control of the accused. In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] MLJ 28 at p. 29, His Lordship stated:

> Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and where about of the goods and power of control over them, not amounting to possession.

Knowledge And Possession

[23] There is no direct evidence imputing such knowledge on the part of the accused. However it is trite law that knowledge, though cannot be proved by the direct evidence, it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession - see *Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597; *Wong Nam Loi v. PP* [1998] 1 CLJ 37; *Samundee Devan Muthu Kerishnan v. PP* [2010] 3 CLJ 269 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337.

[24] However, the learned DPP sought to invoke the deeming provision of possession and knowledge under s. 37(d) which provides that "... Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have known the nature of such drug ..." to prove the same.

[25] On the facts and having succeeded in proving that the accused was having the said luggage under his custody and/or control I have no doubt that the said deeming provision was applicable and was properly invoked against the accused - see *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113. Hence it is my unequivocal finding that the accused was indeed having in his possession the said incriminating drugs.

[26] In this connection learned counsel submitted that in the event that the prosecution succeeds to prove custody or control under s. 37(d) of the DDA, the prosecution has only managed to prove half of what constitutes a "possession". The prosecution shall have to further successfully prove that the accused has the knowledge of the existence and nature of the drugs found. He submitted the following passages in *Toh Su Kuan v. PP* [2005] 3 CLJ 740 to fortify his argument. At p. 745:

> To borrow the example given by our learned brother Abdul Kadir bin Sulaiman JCA in the course of argument, so far as the appellant was concerned, the packets may have contained uncustomed goods such as diamonds or may have contained some other illicit substance. The question is whether the prosecution had brought home the fact that the appellant had knowledge that each of the 36 packets contained heroin which is the subject matter of the charge.

At p. 746:

> In our judgement, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets contained heroin, the drugs which forms the subject matter of the charge.

[27] However, with due respect to learned counsel, the *ratio decidendi* of *Toh Su Kuan v. PP (supra)* that knowledge of the nature of the drugs possessed must only be proved by direct evidence and not by way of drawing inferences from proved facts has been overruled by the Federal Court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717 as indicated in the judgment of Nik Hashim FCJ at para. 5 p. 723. Further at para. 25 p. 741 Augustine Paul FCJ stated:

> [25] The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. The *ratio decidendi* of *Toh Su Kuan v. PP* [2005] 3 CLJ 740 is thus inconsistent with settled legal principles. In particular it conflicts with the correct statement of the law in the Court of Appeal case of *Wong Nam Loi v. PP* [1998] 1 CLJ 37 and the application of the principles in the judgment of this court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381. The Court of Appeal is therefore justified in this case in disregarding *Toh Su Kuan v. PP* [2005] 3 CLJ 740 as the rule of precedent allows it to choose which of its past conflicting decision to follow. As a matter of fact the case ought not to be followed as it cannot stand with the judgment of this Court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381.

[28] In any event the case presently before me is not about *mens rea* possession as were the issues in *Toh Su Kuan v. PP (supra)* and *Parlan Dadeh v. PP (supra)*. It is about the statutory presumption under s. 37(d) of the DDA which was correctly invoked by the prosecution upon prove that the accused was found to have had in his custody or under his control the said luggage containing the said drugs. In such event he is deemed not only to be in possession of the said drugs but is also deemed to have knowledge of the nature of the said drugs until the contrary is proved. By the said statutory presumption, it granted a dispensation to the prosecution from the obligation to prove knowledge on the part of the accused of the nature of the said drugs either by way of direct evidence or by way of inferences from proved facts. The learned counsel's submission upon this issue is verily out of sync with established principles of the law.

Trafficking In The Said Drugs

[29] As there can no double presumption, the prosecution hence relied upon what constitute trafficking as defined in s. 2 of the DDA to prove that the accused was trafficking in the said drugs.

[30] The evidence emanating from the passenger manifest (exh. P51), boarding pass (exh. P25), luggage tag (exh. P26) affixed to the boarding pass, e-ticket (exh. P23), luggage tag (exh. P19(1) affixed to the handle of the said luggage P19, all having the accused's name and the endorsement in his passport (exh. P21) showed that his flight originated from Nigeria and having transited Dubai, finally landed at KLIA, Sepang. The evidence also showed that he had gained access into this country after having obtained clearance from the immigration authorities.

[31] When the accused entered KLIA he had possession of the said drugs in the said luggage he had carried with him. The act of carrying the said drugs from Nigeria into KLIA (Malaysia) is trafficking within the definition of s. 2 of the DDA.

[32] However the authorities stipulates that it must be accompanied by some overt act on the part of the accused. It requires more than mere passive physical possession of the said incriminating exhibits. In *PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480; [2001] 6 MLJ 164, it was ruled that the definition under s. 2 required "... Some overt act that goes beyond passive possession ...".

[33] In my view the issue of some overt act that goes beyond mere passive physical possession is an issue of fact which in the absence of an express admission could be inferred through the conduct of the accused in the light of all the circumstances of the case.

[34] The quantity of the said drugs (1,463g) carried by the accused is huge. In view of the huge quantity it could safely be inferred that it could not have been for his own consumption. As stated by the Privy Council in *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64:

> As a matter of common sense the larger the quantity of drugs involved, the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it ...

[35] Additionally in the absence of any plausible explanation, the inference arises that the said drugs were being carried for the purpose of transferring possession of the said drugs to another person known or unknown and not for the accused's own consumption. It is not the prosecution's imperatives to prove who that other person is upon whom the said drugs were intended to be transferred to.

[36] There can be no other inference other than that inferred above. This is the overt element on the part of accused in carrying the said drugs into this country, constituting trafficking as required under the definition under s. 2 of the DDA.

[37] Additionally the said drugs were very cunningly hidden beneath two layered linings. The purpose of doing so obviously is to deceive the authorities of the presence the said drugs in the luggage. Who would have thought that there were drugs inside the luggage if not for the vigilance of PW4?

[38] The offending drugs were also neatly wrapped in aluminium foil packets and neatly placed beneath the two layered linings. The clandestine nature of the accused's conduct in carrying the said drugs in the manner aforesaid could only lead to the inference that he was trafficking in the said drugs. He was not in mere passive physical possession of the said drugs.

[39] It is hence my finding that on facts and evidence, the accused was not merely having passive physical possession of the said drugs. The amount of the drugs is huge and he was actively concealing the said drugs in the luggage he had carried with him from Nigeria. He was in fact caught in the act of carrying the said drugs from Nigeria into Malaysia. The evidence is overwhelming enough to show the overt acts of the accused indicating his intention or purpose of trafficking in the said drugs, which in the absence of an express admission is a matter of inference from what he did.

[40] It was stated by high authority of the Privy Council in *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP (supra)* that, at p. 69A:

> Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a

quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible.

[41] The conduct of the accused was on all fours within the *dictum* enumerated above.

Issues Raised By The Defence

No Attempt To Flee By The Accused

[42] The fact that the accused was cooperative upon his arrest and thereafter is no ground to suggest that the accused has no knowledge of the said drugs in his luggage. He was confined within the four walls of the CPP's office and surrounded by officers with legitimate authority to apprehend and deal with him according to the law. He has no place to run. He was left with no option but submit and co-operate with the authorities.

Expression Of Being Shocked

[43] Equally the fact that he appeared shocked *per se* upon the discovery of the said drugs is no ground to suggest that his conduct is consistent with his innocence. By the same token in the absence of other compelling evidence, it is no ground to suggest that he had successfully rebutted the presumption of knowledge of the nature of the said drugs. Such expression of being shocked or being stunned could operate either way on account that it is a very subjective perception and ought not to be given exaggerated importance. It is not and cannot be the sole criteria to gauge his innocence nor otherwise his guilt.

The Put Questions To PW4 And PW5

[44] It was put to PW4 and PW5 that the accused owes a Nigerian syndicate USD30,000 due to his clothing and shoes business doing very badly three years ago. The syndicate approached and informed him that they are willing to waive the debt if he agreed to smuggled diamonds to Malaysia. The luggage P19 was given to the accused by one "Ifeanyi" at the Nigerian Airport and the accused was asked to put his clothes in the luggage. He was then told that the luggage contained diamonds and precious stones and that he was to carry the luggage to be given to someone in Malaysia.

[45] It was also put to the two witnesses that the accused mentioned a person called "George" who was with him in the same flight and that "George" was the person tasked to follow him to ensure that the accused deliver the diamonds and precious stones to a person in Malaysia. The accused's accommodation in Swiss Inn in Malaysia was arranged by "Ifeanyi" and that the delivery arrangement of the diamonds and precious stones in Malaysia has been arranged by "George".

[46] Hence learned counsel submitted that the accused was an innocent carrier and he was led to believe that he was carrying diamonds and precious stones at all times. The prosecution therefore failed to prove that the accused knew the nature of the drugs.

[47] However in my view such "put" questions are not evidence of the facts stated. It merely constitutes suggestions/propositions by the defence whereby generally, the initial foundation of the defence is being formulated. The accused has to testify over the same and be subjected to the vagaries of cross-examination to determine its veracity. It is no ground to find that the accused had successfully rebutted the presumption of knowledge of the nature of the said drugs based merely upon such put questions which has yet to be testified and proven by the accused. In the final analysis such put questions could not be employed to form the basis of the accused's acquittal at the end of the prosecution's case.

[48] I am fortified in my view by the decision of the then Supreme Court in *PP v. Adetunji Adeleye Sule* [1993] 3 CLJ 113 at p. 115; [1993] 2 MLJ 70 at p. 71:

> With respect to the trial judge, we considered that he was wrong to have acquitted the respondent at the close of the case for the prosecution because, neither the conduct and demeanor of the respondent accepting that to be consistent with innocence, nor his caution statement (which, if true was a complete answer to the charge), should have constituted "proof to the contrary" sufficient to rebut the statutory presumption raised against him having regard to the principles enunciated in *PP v. Yuvaraj*.

Further down at p. 116 (CLJ) p. 74 (MLJ) the court stated: A

> In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of court statement by the accused and this would include a caution statement which is wholly exculpatory should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since, at that stage, the accused not having given evidence himself, his explanations could not be tested by cross-examination. B

[49] In *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560, the Federal Court also decided at p. 250 (CLJ); p. 575 (MLJ): C

> In relation to the use of the exculpatory statement of the first respondent (D25), we note that the learned trial judge had used the statement to conclude that Amran occupied room "K" in the house. Learned counsel for the first respondent had also submitted before us that the first respondent's statement, D25, showed that he (the first respondent) did not negotiate nor did he ask the second respondent to buy cannabis. D
>
> With respect, we are of the view that the approach was wrong. A purely exculpatory or self serving statement is not evidence of the facts stated though it may be admitted to show reaction or attitude of the accused at the time he made it. And in considering whether there is a case to answer, the trial judge ought not to take into account such a statement as the basis for founding an order of acquittal and discharge. E F

[50] No doubt the authorities referred to above were in respect of cautioned statements. However, in my view its purport and rationale would equally apply to other statements including put questions as is the case before me. Hence even if cautioned statement could not be made the foundation of an order of acquittal at the close of the prosecution's case or to rebut a statutory presumption, what more put questions plucked out of nowhere. G H

The Existence Of George

[51] It was also put to PW5 that the character called "George" did exist and was travelling in the same flight as the accused to keep an eye upon the accused. The flight passenger manifest (exh. P51) was referred to him and was further put to him that I

A the name Mr George Emonike Osuoha located below the accused's name is the person that was mentioned by the accused as "George" above.

[52] Hence it was submitted that an investigation should have
B been carried out with regard to George and as it was not done, it should be resolved in favour of the defence.

[53] However PW5 testified that the character "George" was never mentioned by the accused to him at any time following the accused's arrest nor during the subsequent investigation. The
C character was raised for the first time in court during his cross-examination. Hence he could not conduct any investigation upon the said character.

[54] I have no reason to disbelieve him. His evidence is cogent and
D consistent enough. The accused's e-ticket (exh. P23) indicated that he came alone. He was also seen walking alone at Green Lane A by PW4 lugging the said luggage before he was approached by PW4 and his team-mate. When he was asked to put the said luggage through the scanning machine he was also
E alone. He made no mention about "George" when PW4 felt something being hidden within the lining layers of the luggage he was carrying. He made no mention about "George" to PW4 when the said drugs were subsequently found by PW4.

F **[55]** If "George" was there to keep an eye on the accused, logic would dictate that he would have been seen in close proximity with the accused at all times or at least seen walking together with the accused along Green Lane A before the accused was stopped by PW4, consistent with his role in accompanying the accused
G throughout the journey from Nigeria to Malaysia. But "George" was not seen together with the accused. PW4 saw the accused walking alone at Green Lane A. He was not challenged by the defence on this account. Neither did the accused inform PW4 of "George's" presence with him or within the vicinity. If "George"
H was seated all the time next to him during the entire flight, the same would have been logically the case when they have landed at KLIA to ensure compliance by the accused of the task forced upon him.

I

[56] In such event I am with the learned DPP's submission that no investigation could be carried out pertaining to the character "George" by PW5 as the said character was brought to his attention only during his (PW5) cross-examination in court. The Mr George appearing in exh. P51 could be any other character not connected with the accused.

Non-Compliance With s. 51A(1)(c) Of The Criminal Procedure Code (CPC)

[57] Learned counsel submitted that the prosecution failed to comply with s. 51A(1)(c) of the CPC which provides that the prosecution shall before the commencement of the trial deliver to the accused a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

[58] According to learned counsel there were many aspects of the case that favoured the defence namely - the accused protested his innocence to PW4 when the drugs in the packages were shown to him; the accused did not attempt to flee, struggle or made difficulties at the time of arrest; and that there was no investigation on George.

[59] However in my view these are issues of facts which calls for evidence to be adduced to determine whether these facts exists to operate in favour of the defence or otherwise. A mere statement coming from the accused without it being tested in cross-examination and without taking into account the testimonies of his opponent is no ground to suggest that the same were factual evidence favourable to the defence and therefore ought to be delivered to the defence pursuant to s. 51A(1)(c) of the CPC.

***Prima Facie* Case**

[60] It is thus my finding that at the end of the prosecution's case, upon a maximum evaluation of the evidence adduced, the prosecution had made out a *prima facie* case against the accused on the charge as proffered within the meaning of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. Should the accused remain silent, the evidence adduced is sufficient to warrant his conviction. Thus the accused was ordered to enter his defence. He opted to testify on oath.

The Defence Case

The Evidence Of The Accused

[61] The accused testified that back in Nigeria, he was a businessman importing clothes and shoes from Indonesia. In 2009, his business went bad and he had to borrow USD30,000 from a syndicate to sustain his business through a man called "Ifeanyi". The loan was to be repaid in the sum of USD40,000 within a year. He failed to repay the loan and it ballooned to USD50,000.

[62] In 2010, he was approached by 'Ifeanyi' who informed him that the syndicate was willing to waive his loan and interest if he agrees to smuggle diamonds and precious stones to Malaysia. "Ifeanyi" also threatened that his family would be harmed if he did not agree. He said he had no choice as this is the only way to solve his debt and also keep his family safe. He was told that all the travelling expenses and visa will be arranged.

[63] On 24 August 2010, he met 'Ifeanyi' at Lagos Airport, Nigeria. "Ifeanyi" came with one "George Emmenike" who was introduced to him. He was told that "George Emmenike" will be travelling on the same journey to Malaysia and will keep an eye on him. "George" will also make all the arrangements in Malaysia including the delivery of the diamonds and precious stones.

[64] The accused added that 'Ifeanyi' brought an empty brown luggage (exh. P19) and instructed him to transfer all his clothes and belongings from his bag into P19. 'Ifeanyi' then zipped P19, locked the luggage and checked-in the luggage directly to Kuala Lumpur. When he asked 'Ifeanyi' about the diamonds and precious stones he was told that they are already in the luggage P19. The accused was then given the keys to P19 and the flight tickets.

[65] On 26 August 2010, the accused arrived at KLIA on board Emirates Flight EK408 from Nigeria *via* Benin, Kenya and Dubai. At about 3pm he was seen by PW4 carrying one brown luggage, P19, and one briefcase, P20, walking from the baggage carousel C and D towards Green Lane A at the KLIA Arrival Hall. He was stopped by PW4 and was asked to put both his luggages through the scanning machine at the customs examination counter. The rest is history.

[66] When the drugs were first shown to him at the CPP's office he was surprised and shocked to see the drugs and denied any knowledge of the drugs in the said luggage.

[67] The accused testified that at all times he was led by 'Ifeanyi' to believe that he was smuggling diamonds and precious stones to settle his debts to the syndicate. The accused maintained throughout the case that he believed that he was smuggling diamonds and precious stones and that he had informed both PW4 and PW5 that he did not know about the drugs when PW5 showed him the drugs.

The Court's Evaluation

[68] The essence of the defence posited by accused is grounded upon the lack of knowledge of the said drugs hidden within the layers lining the said luggage. He was under the impression that he was smuggling diamonds and precious stones upon the behest of 'Ifeanyi'.

[69] However, apart from the accused's bare oral testimony, there is no evidence (documentary) to show the nature of the business he was exactly doing back in Nigeria, no evidence to show that he was in the business of importing clothes and shoes from Indonesia, no evidence that he had suffered losses in 2009 and there is no evidence that his business was doing very badly in 2009. Equally there is no evidence to indicate that indeed he had borrowed USD30,000 from loan sharks to sustain his business. The law is trite that he who assert must prove his assertion - see s. 103 of the Evidence Act 1950.

[70] The accused had testified that he had contacted his wife in Nigeria while under detention. Surely it wouldn't be a big deal for him to get his wife to send the documents pertaining to the above to him. Alternatively he could have easily instructed his counsel to get the said documents from his wife. These formed the crux of his defence. Nevertheless he did none of these.

[71] The accused further testified that he was compelled to do 'Ifeanyi's' bidding. He and his family were threatened by 'Ifeanyi' if he refused to comply with 'Ifeanyi's' demands to smuggle the said diamonds and precious stones out of Nigeria into Malaysia. But why to Malaysia? Malaysia is not known to be a diamond

processing country. More importantly no Malaysian law prohibits the bringing in of precious stones and diamonds into this country. The accused cannot claim and rely on ignorance of the law. The accused could bring in the diamonds and precious stones freely into this country provided the legalities are complied.

[72] Hence upon arrival in Malaysia there is no need for him to be secretive and keep hiding from the customs authorities that he was in fact bringing in diamonds and precious stones. He could freely declare to PW4 that he was bringing in diamonds and precious stones into the country.

[73] It is also pertinent to note that the accused had testified that Nigeria and Sierra Leone shared common borders and that cross border smuggling of diamonds and precious stones are most prevalent between the two countries. However from the article "Conflict Diamonds" submitted by learned counsel, it is apparent that the said diamond conflict was primarily between Angola and Sierra Leone and Sierra Leone is buffered by five other countries from Nigeria namely Liberia, Ivory Coast, Ghana, Togo and Benin. As regards to Angola, the country is separated from Nigeria by four other countries namely DR Congo, Congo, Gabon and Cameroon. It showed that the areas involved in the diamond conflicts were distance away from Nigeria. Hence there is no basis for the court to take judicial notice as was urged by learned counsel, that the smuggling of diamonds and precious stones out of Nigeria is a common phenomenon. The defence has to provide concrete evidence of the same.

[74] Additionally what exactly were the threats levelled against him and his family by 'Ifeanyi' that really bothered him and compelled him into submission? The accused had failed to disclose the nature of the said threats to account for his blind compliance notwithstanding that the same were equally the crux of his defence. How serious were the threats then to justify his conduct?

[75] Now the accused said that at Lagos Airport 'Ifeanyi' produced luggage P19 and ordered him to empty the luggage he had brought with him and put all his clothes and shoes into luggage P19. 'Ifeanyi' also told him that the diamonds and precious stones were already inside the luggage P19 and proceeded to lock the luggage and checked-in the luggage for him.

[76] However the accused did not bother to inquire further. He did not insist to see and examine the diamonds and precious stones. He did not ask where exactly the diamonds and precious stones were kept inside the said luggage. He did not bother to inquire and ensure whether the diamonds and precious stones were in fact inside the said luggage. He was entrusted to send those items to someone in Malaysia but did nothing to ensure whether the said items were in fact there to be sent. A reasonable man similarly circumstanced would have done more to investigate 'Ifeanyi's' claims that the diamonds and precious stones were in fact inside the said luggage. What more if the task or errand that he was supposed to do is a substitute for his life and limb and his family's safety.

[77] The accused is not a half witted simpleton. He was, as he claimed to be, in the business of importing clothes and shoes from Indonesia. By his vocation, he is fully exposed to the intricacies of life. Indeed in all the circumstances of the case his conduct bellied his innocence. His desperation to free himself from the clutches of the loan syndicate is no excuse to embark on a journey in the most casual fashion. Equally it is no excuse to ignore basic precautionary measures bearing always that he was fully aware of the risk factors involved in indulging in the said illegal smuggling activities, be it diamonds/precious stones or otherwise.

[78] Additionally I am with the learned DPP's submissions that the accused's testimony regarding as to how he came into possession of the said luggage P19, and the role played by 'Ifeanyi' and 'George' in the whole scheme of events was raised for the first time to the prosecution witnesses (PW4 and PW5) only in court. PW4 in re-examination was honest enough to say that after the drugs were recovered and shown to the accused, the accused had informed him that he did not know anything about the contents inside the said aluminium packets and that someone had given the said luggage to him.

[79] However it is pertinent to again note that he did not inform PW4 that he was in fact carrying diamonds and precious stones hidden inside the said luggage. This is rather strange, bearing in mind that at all times he had maintained that he was instructed by 'Ifeanyi' that he was to smuggle diamonds and precious stones

into Malaysia. Sifting through the accused's own testimony, it is very apparent that there is no evidence that the accused had in fact informed both PW4 and PW5 that he was carrying diamonds and precious stones inside the said luggage. He merely said that he had his clothes and shoes inside the said luggage and when confronted with the said drugs, he merely said that he had no knowledge of the contents of the aluminium foil packets. This is most inconsistent with his stated position enumerated above. In such event his expression of being shocked upon the recovery of the said drugs is no indication of his want of knowledge of the nature of the items in the said two aluminium foil packets. He knew all along and indeed had knowledge of what in fact he was carrying inside the said luggage P19, hidden within the layers lining the same.

[80] Additionally I have no reason to dispute the evidence of PW4 that the accused did not mention anything about the presence of 'George' throughout the journey to Malaysia or 'Ifeanyi' or the roles played by both of them. His evidence was cogent and was fully tested in cross-examination. It remained unscathed. The evidence of PW5 were on all fours with the evidence of PW4 in so far as the presence of 'George' and 'Ifeanyi' and the roles played by them is concerned. The two characters adverted to by the accused in his testimony were never mentioned to him nor raised by the accused in the entire course of the investigation of the case. In such event I have no hesitation to accept PW5's testimony that he did not investigate these two characters on account of the same. Again in such event I am with the learned DPP that the accused's evidence pertaining to these two characters and the roles played by them are mere recent inventions pandering in afterthought.

Verdict At The End Of The Defence Case

[81] At both stages of the proceeding, the burden of the prosecution is to prove its case beyond a reasonable doubt. The burden of the accused is only to raise a reasonable doubt on the truth of the prosecution's case, and if a statutory presumption is invoked against him, it is equally his burden to rebut the said presumption on a balance of probabilities. Meanwhile the business of the court is to consider whether the evidence posited by the

defence/accused and his witnesses has thrown a reasonable doubt on the prosecution's case or if the statutory presumption is applicable against him, whether such presumption has been successfully rebutted. If so, the accused is then to be discharged and acquitted - see *Mohamed Yatin Abu Bakar v. PP* [1949] 1 LNS 50; [1950] MLJ 57.

[82] For all the reasons enumerated above, I am satisfied that the defence posited by the accused has not created a reasonable doubt upon the prosecution's case upon which he was called to enter his defence. The said drugs were carried into this country from Nigeria. No evidence was adduced to account for his conduct in trafficking the said drugs into Malaysia through KLIA.

[83] Equally the defence of the accused has failed on the balance of probabilities to rebut the statutory presumption invoked against him under s. 37(d) of the DDA 1952. The factum of custody and control of the luggage P19 remained intact. On the evidence adduced, the accused had equally failed to rebut the deemed possession of the said drugs and the deemed knowledge of the nature of the said drugs. The defence of the accused is a simple denial of having possession of the said drugs and having knowledge of the nature of the said drugs. Such denial is insufficient without other proof to reasonably dislodge the prosecution's case and is equally incapable of rebutting the presumption applicable against him.

[84] On the other hand I am satisfied that the prosecution had successfully proven the offence against the accused beyond a reasonable doubt. The accused is accordingly found guilty and convicted of the offence as proffered.

[85] Consequently he is sentenced to death by hanging according to law.